

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

MELVIN KEITH JONES,

Plaintiff,

v.

BERGELECTRIC, INC., et al.,

Defendant.

No. 2:21-cv-0614-KJM-CKD PS

ORDER GRANTING EXTENSION OF TIME
FOR PLAINTIFF TO COMPLETE SERVICE
BY FILING DEFENDANT ABC'S SIGNED
WAIVER

Defendant ABC's motion to dismiss, filed August 27, 2021, is pending. Plaintiff has filed an opposition, to which defendant ABC has replied. Having read and considered the papers filed in support of and in opposition to the motion, the court orders as follows.¹

I. Background

Plaintiff Melvin Keith Jones filed this case on November 30, 2020 in the United States District Court for the Northern District of California. He proceeds pro se, alleging claims under Title VII of the Civil Rights Act of 1964. Plaintiff proceeds against two defendants: Bergelectric, Inc., and Associated Builders and Contractors, Inc., Northern California Chapter Unilateral

¹ Defendant ABC's motion to dismiss shall remain pending. Until resolution of the motion, or until the court orders otherwise, defendant ABC has no obligation to file further responses to documents filed by plaintiff.

1 Apprenticeship Committee (hereinafter “ABC”). Defendant Bergelectric answered the complaint
2 on December 14, 2020.

3 The district court in the Northern District of California transferred this case to this court
4 on April 2, 2021. By order dated April 5, 2021, a status conference was set to take place on
5 September 8, 2021; the status conference has since been reset to take place on November 3, 2021.
6 (See ECF No. 41.) In the April 5, 2021 order, plaintiff was directed to complete service of process
7 on the defendants named in the complaint within 90 days. Plaintiff was cautioned that a failure to
8 complete service of process within 90 days from the date on which the complaint was filed could
9 result in dismissal under Rule 4(m) of the Federal Rules of Civil Procedure. (ECF No. 30.)²

10 On August 27, 2021, defendant ABC moved to dismiss plaintiff’s claims against
11 defendant ABC pursuant to Rules 4(m) and 12(b) of the Federal Rules of Civil Procedure.
12 Defendant ABC argues plaintiff failed to meet statutory and court-imposed deadlines for serving
13 defendant ABC. In the alternative, defendant ABC argues the complaint fails to state a claim
14 upon which relief can be granted. (ECF No. 43.)

15 Defendant ABC’s motion to dismiss was set for a hearing to take place on October 6,
16 2021. Plaintiff did not file a timely opposition. On September 28, 2021, the court ordered plaintiff
17 to show cause, in writing and within 14 days, why plaintiff’s failure to oppose the motion to
18 dismiss should not waive the right to oppose the motion and why plaintiff’s claims against
19 defendant ABC should not be dismissed. (ECF No. 44.)

20 Plaintiff has filed an opposition to the motion to dismiss. (ECF No. 47.) Plaintiff argues
21 that the court should hear his claims against defendant ABC but does not address the arguments
22 raised in the motion to dismiss, including the argument that he has not properly served defendant
23 ABC.

24 **II. Discussion**

25 A federal court does not have jurisdiction over a defendant unless the defendant has been
26 served properly under Federal Rule of Civil Procedure 4. See Omni Capital Int’l Ltd. v. Rudolf

27 ² Plaintiff has indicated he did not receive the court’s April 5, 2021 order until August 18, 2021.
28 (ECF No. 33.)

1 Wolff & Co., 484 U.S. 97, 104 (1987). Service of process must be completed “within 90 days
 2 after the complaint is filed.” See Fed. R. Civ. P. 4(m). Rule 4(h) specifies the manner of service
 3 required upon “a domestic or foreign corporation, or a partnership or other unincorporated
 4 association that is subject to suit under a common name[.]” Fed. R. Civ. P. 4(h). The manner of
 5 service specified in Rule 4(h) applies “*unless the defendant’s waiver has been filed[.]*” Id.
 6 (emphasis added).

7 Here, plaintiff elected to pursue a waiver of service from defendant ABC and the court’s
 8 analysis is therefore guided by Rule 4(d) of the Federal Rules of Civil Procedure. If a defendant
 9 agrees to waive service by returning the waiver to the plaintiff, then the date of service is deemed
 10 to be the date on which the plaintiff files the *signed* waiver form with the court. Fed. R. Civ. P.
 11 4(d)(4) (emphasis added). If the defendant agrees to waive service, then once the plaintiff files the
 12 defendant’s signed waiver, the action proceeds “as if the summons and complaint had been served
 13 at the time of filing the waiver.” Fed. R. Civ. P. 4(d)(4). “The only issues that are eliminated by
 14 the waiver are those involving sufficiency of the summons or sufficiency of the method by which
 15 the summons is served”; the waiver does not preclude a challenge under Rule 4(m). See Patel v.
 16 Dameron Hosp., No. Civ-S-99-1275-DFL-PAN, 2000 WL 35619441, at *2 (E.D. Cal. June 23,
 17 2000) (citing Schwarzer, Tashima & Wagstaffe, *Federal Civil Procedure Before Trial* (TRG
 18 1999), § 5:157, p. 5-31); see also Fed. R. Civ. P. 4(d), (m).

19 Pertinent here, according to the declaration and argument submitted in support of
 20 defendant ABC’s motion to dismiss, defendant ABC has signed a waiver of service and returned
 21 it to plaintiff on January 20, 2021. (ECF No. 43-3 at ¶ 3.) Plaintiff has not, however, filed the
 22 *signed* waiver with the court. Thus, defendant ABC maintains it has not been properly served.
 23 Indeed, as set forth, Rule 4(d) requires a plaintiff to file a defendant’s signed waiver with the
 24 court in order for the action to proceed “as if the summons and complaint had been served at the
 25 time of filing the waiver.” Fed. R. Civ. P. 4(d)(4).

26 It appears that plaintiff has misunderstood the procedure for waiving service under Rule
 27 4(d); simply obtaining the signed waiver from defendant does not constitute service on a
 28 defendant. Rather, *plaintiff must file the executed [signed] waiver* within Rule 4(m)’s 90-day

1 window. See Fed. R. Civ. P. 4(d), (m); Pine v. City of Oakland, No. 19-CV-02136-AGT, 2020
 2 WL 2512404, at *4-5 (N.D. Cal. May 16, 2020).

3 Here, plaintiff filed the *unsigned* waivers he sent to both defendants at the time he mailed
 4 the waivers. (ECF No. 11.) However, plaintiff has not filed a signed waiver for either defendant.³

5 When a defendant challenges service, the plaintiff bears the burden of establishing the
 6 validity of service as governed by Rule 4 of the Federal Rules of Civil Procedure. See
 7 Brockmeyer v. May, 383 F.3d 798, 801 (9th Cir. 2004). Where, as here, service was not
 8 completed in accordance with Rule 4(m), the district court applies a two-step analysis to
 9 determine whether to extend the time for such service. See In re Sheehan, 253 F.3d 507, 512 (9th
 10 Cir. 2001). If good cause is shown, the court must grant an extension; if good cause is not shown,
 11 the court still has the discretion to grant an extension. See Efaw v. Williams, 473 F.3d 1038, 1040
 12 (9th Cir. 2007). In deciding whether to grant such an extension, a district court “may consider
 13 factors like a statute of limitations bar, prejudice to the defendant, actual notice of a lawsuit, and
 14 eventual service.” See Id. at 1041 (internal quotation and citation omitted).

15 Defendant argues that an extension is not warranted because plaintiff has been on direct
 16 and explicit notice of his failure to properly effectuate service against defendant ABC since
 17 defendant ABC filed its Case Management Conference Statement on March 2, 2021. However,
 18 the court finds the applicable factors weigh in favor of granting plaintiff an extension.
 19 Significantly, defendant ABC has not shown it will be prejudiced by the delay and defendant has
 20 had actual notice of the action since at least January 20, 2021. In addition, plaintiff is representing
 21 himself, and pro se litigants are given some consideration in federal litigation in that their
 22 pleadings are liberally construed.⁴

23 ³ As set forth, though, defendant Bergelectric answered the complaint and did not challenge
 24 service of process. Thus, only the executed waiver of defendant ABC is at issue.

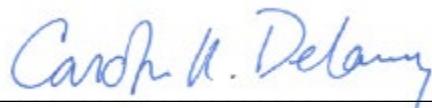
25 ⁴ Nonetheless, pro se litigants are expected to know and comply with the rules of civil procedure
 26 and are not exempt from complying with the basic rules for service of process. American Ass’n of
Naturopathic Physicians v. Hayhurst, 227 F.3d 1104, 1108 (9th Cir. 2000). A plaintiff’s pro se
 27 status does not excuse untimely service. Id. at 1108; see McNeil v. United States, 508 U.S. 106,
 28 113 (1993) (“[W]e have never suggested that procedural rules in ordinary civil litigation should
 be interpreted so as to excuse mistakes by those who proceed without counsel.”).

1 Despite any consideration of his pro se status, though, plaintiff has not met his burden to
2 show that he properly served defendant ABC because he has not filed the waiver of service
3 executed by defendant ABC. See Livingston v. Morgan, No. C-06-2389 MMC, 2007 WL
4 1150922, at *3 (N.D. Cal. Apr. 18, 2007) (“[Plaintiff], however, has not filed a waiver returned
5 by [defendant] as required by Rule 4(d), and accordingly, [plaintiff] fails to demonstrate service
6 under Rule (4)(d).”).⁵ In order to demonstrate proper service, plaintiff must either serve defendant
7 ABC and file proof of such service, or file the waiver of service already executed by defendant
8 ABC which defendant ABC returned to plaintiff on January 20, 2021.

9 Accordingly, for the reasons set forth herein, IT IS HEREBY ORDERED:

- 10 1. The deadline for plaintiff to serve defendant ABC, and to file proof of such service, is
11 extended to November 12, 2021;
- 12 2. Plaintiff shall file the waiver of service already executed by defendant ABC on or
13 before November 12, 2021; and
- 14 3. Plaintiff is cautioned that failure to file the waiver of service executed by defendant
15 ABC on or before November 12, 2021 may result in dismissal of plaintiff’s claims against
16 defendant ABC.

17 Dated: October 12, 2021



CAROLYN K. DELANEY
UNITED STATES MAGISTRATE JUDGE

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22 ⁵ However, there is also the question whether plaintiff has substantially complied with service
23 requirements, an issue neither party has addressed. See, e.g., Azzawi v. Brown, No. 2:15-cv-
24 1468-GEB-AC, 2015 WL 6460363, at *3 (E.D. Cal. Oct. 26, 2015) (noting that the doctrine of
25 substantial compliance “exists to save instances of ineffective service based on *technical* defects
26 to avoid dismissals that would prejudice the plaintiff” (emphasis in original)); Procopio v. Conrad
27 Prebys Tr., No. 14cv1651 AJB (KSC), 2015 WL 4662407 (S.D. Cal. Aug. 6, 2015) (noting that
28 substantial compliance is to address “minor defects in service and prevent dismissal,” not to
prevent the quashing of improper service). Because the court is granting plaintiff an extension of
time to complete service by filing defendant ABC’s signed waiver, the court does not now decide
whether plaintiff could be said to have substantially complied with Rule 4 as to service of
defendant ABC.